

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES
REASONS FOR DECISION

CONSTABLE BRANDON WILSON

Appellant

ONTARIO PROVINCIAL POLICE

Respondent

Presiding Members:

Dr. Tammy Landau, Member
Hyacinthe Miller, Member

Appearances:

Leo A. Kinahan, Counsel for the Appellant
Lynette E. D'Souza, Counsel for the Respondent

Hearing Date: Monday, September 18, 2006

This is an appeal by Constable Brandon Wilson from a conviction on May 11, 2005 for the disciplinary offence of unlawful or unnecessary exercise of authority contrary to sections 2(1)(g)(i) and (ii) of the Code of Conduct found at Ontario Regulation 123/98 as amended (the "Code") by retired Superintendent A. Griffiths (the "Hearing Officer").

Penalty is not at issue.

Background:

The facts of this case are not complex but much in dispute.

At the time the events giving rise to this appeal, Constable Wilson was 28 years old and had been a member of the Ontario Provincial Police ("OPP") since September 12, 2000. At the time of the events in question, he was stationed at the Killaloe Detachment in northeastern Ontario.

On April 19, 2003, Constable Wilson was working the night shift in Barry's Bay, a small community two hours northwest of Ottawa. He was in full uniform and driving a marked police vehicle. The weather that evening was clear and cool. At approximately 10:38 p.m. Constable Wilson was patrolling. He observed a male and female walking side-by-side on the left-hand or south side of Kelly

Street in a residential area. They were facing traffic, with the male person closest to the roadway. The male was Mr. Jerry Yakabuskie. The female was Ms. Vanessa Cowan, his girlfriend at the time.

As Constable Wilson drove past, the male yelled something in the direction of the cruiser. The nature of this 'yell' is in dispute. According to Constable Wilson, he looked right at the male, saw his mouth moving and heard the words "Fuck you, you fucking pig, fuck off". According to Mr. Yakabuskie he yelled "Happy Easter".

Constable Wilson slowed his vehicle to a stop and reversed to where both people were standing. He rolled his window down and asked if everything was okay. He then asked the male what his name was. According to Constable Wilson, the male replied, "Fuck you, I don't have to".

Constable Wilson stepped out of his vehicle and again asked the male to identify himself. Mr. Yakabuskie repeated that he did not have to identify himself. According to Constable Wilson, he observed a strong smell of alcohol coming from the man's breath. He also observed that his eyes were bloodshot and his speech slurred. Mr. Yakabuskie states that he told Constable Wilson that he had had only one beer earlier that evening.

Mr. Yakabuskie turned around and began to walk away from Constable Wilson. Constable Wilson again asked the male to cooperate and requested his identification. The woman told Constable Wilson the man's name was Jerry Yakabuskie. She suggested to Mr. Yakabuskie that he should cooperate.

According to Constable Wilson, he felt that Mr. Yakabuskie's loud shouting and swearing would disturb people in the neighbourhood and he formulated the belief that Mr. Yakabuskie was intoxicated in a public place. Constable Wilson advised Mr. Yakabuskie that he was under arrest for failing to identify himself and public intoxication under the Liquor License Act R.S.O. 1990, c. L. 19 as amended.

Constable Wilson grabbed Mr. Yakabuskie by the left hand. His right hand was free at his side. Constable Wilson advised him to put both hands behind his back but Mr. Yakabuskie did not do so. Mr. Yakabuskie started to struggle.

According to Constable Wilson, Mr. Yakabuskie brought his arm back as if he was going to strike him. Because he felt he was going to be assaulted, Constable Wilson struck Mr. Yakabuskie in the head with his right fist, to distract him. The struggle continued and Constable Wilson hit Mr. Yakabuskie two or three more times using a palm strike or upward fist.

The two men fell over the back bumper of the cruiser to the ground. Constable Wilson had his right knee pressed down on Mr. Yakabuskie and was having some difficulty gaining physical control. Mr. Yakabuskie was on his stomach with his right hand behind his back and his left hand under his body.

At one point in the struggle Constable Wilson states that he saw something black in Mr. Yakabuskie's hand that could have been a knife. Eventually Mr. Yakabuskie's left hand became free and Constable Wilson was able to handcuff him and walk him to the police car where Mr. Yakabuskie was placed in the back seat. The incident lasted about two minutes. There was no knife.

Ms. Cowan, who had been urging Mr. Yakabuskie to stop fighting, was upset and asked Constable Wilson if he would return Mr. Yakabuskie home. Instead, he was transported to the Detachment. Ms. Cowan, who was five months pregnant at the time was left by herself on the street to make her own way home.

On arrival at the Killaloe Detachment , Mr. Yakabuskie was rude, but compliant. He was released from custody at the Detachment. Constable Wilson drove him home at 4:00 a.m. At no time during his arrest did Mr. Yakabuskie request medical assistance or complain of injuries. However, he visited St. Francis Hospital some time afterwards.

Eleven days later, he and Ms. Cowan filed a public complaint against Constable Wilson. Ms. Cowan composed the letter of complaint because her grammar and penmanship were better than Mr. Yakabuskie's. Eventually, the charges against Mr. Yakabuskie were either withdrawn by the Crown or dismissed.

Constable Wilson was served with a Notice of Hearing on November 11, 2003. He was charged with unlawful or unnecessary exercise of authority. The particulars read:

That on April 19th, 2003 you arrested Mr. Jerry Yakabuskie for Public Intoxication under the Liquor Licence Act when said arrest was not warranted or allowed by law and use more physical force than was necessary during your arrest of Mr. Yakabuskie. You know or ought to have known that your actions were inappropriate.

Constable Wilson pled not guilty.

The Hearing:

The disciplinary hearing took two days and was completed on February 22, 2005. Testimony was heard from six witnesses including Constable Brandon Wilson, Mr. Jerry Yakabuskie, Ms. Vanessa Cowan, Constable P.J. Beaudry, Sergeant Mark Mackisoc and Sergeant John Gemmell.

The Hearing Officer issued his seven-page judgment on May 11, 2005 and his sentencing decision on September 19, 2005.

In his decision, the Hearing Officer provided an overview of the evidence. He indicated that he gave considerable attention to the evidence presented by all of the witnesses and, in particular, Mr. Yakabuskie's demeanour. He also indicated there were a number of inconsistencies in the evidence of the witnesses and that he was cautious about the weight he placed on that evidence.

While some of Mr. Yakabuskie's responses were deemed to be self-serving, the Hearing Officer found his evidence to be credible. The Hearing Officer observed the conduct and evidence given by Vanessa Cowan and noted that, even though there were some inconsistencies, she was also a credible witness.

As a result, the Hearing Officer found Constable Wilson guilty. It is that finding which is the subject of this appeal.

Appellant's Position:

Mr. Kinahan, on behalf of Constable Wilson, stated that the essence of his appeal lies in the Hearing Officer's misapprehension of evidence. He contended that the Hearing Officer failed to properly assess the evidence presented and thus erred in essential aspects of his reasoning.

On this point, Mr. Kinahan drew our attention to R v. Morrissey (1995), 97 C.C.C. (3d) 193, (Ont. C.A.) R. v. Vanloon [1997] O.J. No 3209 (Ont. Ct. Jus.), Gulf Sea Products Ltd. v. National Sea Products Ltd. [1985] P.E.I.J No. 11 (P.E.I.C.A.) and R. v. Valois [2005] O.J. No. 1594 (Ont. Ct. Jus.).

In particular, Mr. Kinahan asserted that the Hearing Officer failed to set out cogent reasons why he believed or did not believe testimony and as a result his reasons were "rote assertions deserving little weight". McGuire v. Royal College of Dental Surgeons (1997), 77 D.L.R. (4th) 732 (Ont. Div. Ct.)

According to Mr. Kinahan it was unfathomable that the Hearing Officer could have reached the conclusion he did, based on the conflicting testimony of the witnesses. Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (O.C.C.P.S.)

He drew our attention to several examples of matters on which the key witnesses could not agree. Mr. Kinahan argued that the lack of consistency on these key matters should have been of concern to the Hearing Officer.

Mr. Kinahan noted the Hearing Officer acknowledged on page one of his decision that credibility was an important issue. He mentioned considering the testimony of all witnesses, but did not specify how he reached his conclusions relating to credibility nor did he enumerate how he analyzed the inconsistencies in witnesses' evidence.

It is Mr. Kinahan's position that the Hearing Officer should have identified and considered the inconsistencies among the witnesses and all relevant factors in coming to his conclusions about credibility. The Hearing Officer should have indicated the testimony on which he based the rationale for his decision, particularly when he concluded that Constable Wilson is not credible.

He suggested that failure to do so was an error. On this point, he noted Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services (1985), 51 O.R. (2d) 302 (Ont. Div. Ct.), R. v. M. (Y.) (2004), 71 O.R. (3d) 388 (Ont. C.A.), Bluenose Fisheries Ltd. v. Tabusintac Fish Market Ltd. [1987] N.B.J. No. 11 (N.B.C.A.), R. v. Tottenham Transport Ltd. (2005), 76 O.R. (3rd) 116 (Ont. Ct. Jus.), R v. Kendall [2005] O.J. No. 2457 (Ont. C.A.) and Stitt and York Regional Police Service (1997), 3 O.P.R. 1130 (O.C.C.P.S.).

Mr. Kinahan drew our attention to the fact that in the month preceding the interaction between Constable Wilson and Mr. Yakabuskie, Sergeant Mackisoc attended a residence to speak with Ms. Cowan. When he asked Mr. Yakabuskie if she was at the residence, Sergeant Mackisoc was told no. Yet, she was found a short time later hiding under a sink.

Mr. Kinahan pointed out that clearly, Mr. Yakabuskie lied; however, the Hearing Officer did not consider this when he assessed the credibility of Ms. Cowan and Mr. Yakabuskie.

On the issue of determining public intoxication prior to arrest under the Liquor Licence Act, Mr. Kinahan suggested that there is no checklist. An officer must make a determination on the factors present at the time. For example, Mr. Yakabuskie was verbally aggressive, slightly unsteady on his feet and there was an odour of alcohol.

In conclusion, Mr. Kinahan requested that we overturn the conviction or in the alternative order a new hearing on the charge against Constable Wilson.

Respondent's Position:

Ms. D'Souza replied on behalf of the OPP. She reminded us of the standard of review for disciplinary appeals. She asked us to focus on the issue of whether the Hearing Officer's decision was reasonable. Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (O.C.C.P.S.), Toronto (City) Police Service v. Blowes-Aybar [2004] O.J. No. 1655 (Ont. Div. Ct.) and Godfrey and Ontario Provincial Police (15 January, 2002, O.C.C.P.S.)

Ms. D'Souza noted that it fell within the domain of the Hearing Officer to make determinations on the matter of credibility since he had the direct benefit of hearing testimony and examining evidence first-hand. Carmichael and Ontario Provincial Police (1998) 3 O.P.R. 1232 (O.C.C.P.S.)

According to Ms. D'Souza, the Hearing Officer reviewed the oral and documentary evidence before him closely, observed the demeanour of witnesses and commented on their credibility in the context of other witnesses. Despite the inconsistencies in both Ms. Cowan's and Mr. Yakabuskie's evidence, they were found to be credible witnesses on essential matters. The Hearing Officer did not accept Constable Wilson's version of events.

Ms. D'Souza suggested that the Commission should not be persuaded to retry the matter through the transcripts. She drew our attention to Blowes-Aybar and Toronto Police Service (28 February, 2003, O.C.C.P.S.) and Toronto (City) Police Service v. Blowes-Aybar.

She observed that we should give due deference to the Hearing Officer, who was in the best position to make findings. Galassi v. Hamilton (City) Police Service [2005] O.J., No. 2301 (Ont. Div. Ct.)

She asserted that the Hearing Officer made reasonable factual findings and there was no manifest error. His reasons were sufficient. He tied them to the issue of credibility. His reasons were consistent with case law. McNab and Ontario Provincial Police (1997), 3 O.P.R. 1193 (O.C.C.P.S)

She pointed out that there was evidence that supported the finding that the arrest of Mr. Yakabuskie was unlawful and that unnecessary force was used. She drew our attention to various portions of the evidence.

With respect to Pitts and R. v. M. (Y.), Ms. D'Souza contends that one is criminal and the other is in a family law context and are of limited applicability. This appeal is about employment and police discipline.

For the above reasons, Ms. D'Souza requested that we deny this appeal and uphold the conviction.

Decision:

On an appeal from the finding of misconduct, our responsibilities are clearly set forth on page 1058 of Williams and Ontario Provincial Police in an oft quoted passage:

Our role or function in such matters is not to second-guess the decision of the adjudicator. In certain limited cases, it would be open to us to reach a different conclusion from the trier of fact. However, that must be based on the strongest ground. In other words, there can be no other determination than the conclusions of the adjudicator, as to the credibility of witnesses, cannot be reasonably accepted.

The question to be asked in this case is, are the conclusions of the adjudicator void of evidentiary foundation?

This can be a difficult test for an Appellant to meet. The words “void of evidentiary foundation” clearly contemplate that appellate interference with evidentiary findings will be exercised sparingly. Norris v. Loranger (1998), 2 P.L.R. 493 (Ont. Bd. Inq.)

Commission appeals are on the record. Not only do we hear from counsel for an appellant and respondent, we have the opportunity to review all of the evidence submitted, including transcripts of sworn testimony, physical evidence such as photographs, audiotapes and police documentation. However, we do not have the benefit of seeing and hearing the witnesses.

We have examined the record and the Hearing Officer’s judgment dated May 11, 2005. We acknowledge that his reasons could have been more detailed. That being said, we cannot agree that the Hearing Officer’s decision was void of evidentiary foundation.

The allegation in this case was that Constable Wilson “without good or sufficient cause” made “an unlawful or unnecessary arrest” and used “unnecessary force against a prisoner or other person contacted in the execution of duty”.

There is no question that on the evening of April 19, 2003 an encounter took place between Constable Brandon Wilson and Jerry Yakabuskie. The only witness was Vanessa Cowan. Constable Wilson arrested Mr. Yakabuskie and force was used.

During the course of the hearing it became apparent that there were a myriad of points on which there was no agreement. These included:

- Did Mr. Yakabuskie yell “Happy Easter” or “Fuck you, fucking pig, fuck off” as the police cruiser drove by?
- Was the cruiser window darkly tinted and closed or clear and partly open?
- When and how much beer had Mr. Yakabuskie consumed?
- Did the altercation take place close to the cruiser or twenty feet away?
- Did the altercation last for four minutes, eight minutes or fifteen to twenty minutes?
- Did Constable Wilson have his knee on Mr. Yakabuskie’s back or neck?
- Did Constable Wilson throw four, five or six punches?
- Was Constable Wilson wearing a baseball cap or was he bare-headed?

- Was the cruiser door closed without incident or was it slammed on Mr. Yakabuskie's foot?
- Was Mr. Yakabuskie threatened with pepper spray at the Detachment?
- Were the photographs of Mr. Yakabuskie's injuries taken by Ms. Cowan one or two days afterwards or four to five days afterwards because she had to buy film for her camera?

In our view, while these matters may have had some relevance, they were peripheral to the central issue. That is, whether or not Constable Brandon Wilson without good cause made an unlawful or unnecessary arrest and flowing from that, used unnecessary force.

On the evening in question Mr. Yakabuskie and Ms. Cowan were walking on a public street. A comment was yelled in the direction of the police cruiser as Constable Wilson drove by. According to Constable Wilson he observed the couple on the side of the road for approximately 10 seconds. He saw the man's mouth moving and thought he heard him yell an obscenity.

Both Mr. Yakabuskie and Ms. Cowan testified that the remark was "Happy Easter".

Based on this ten-second glance at two people walking along the side of a dark, empty roadway and a shout from the male, Constable Wilson reversed his vehicle and set the stage for the events that followed.

Constable Wilson approached Mr. Yakabuskie and asked him what he had said and to identify himself. Mr. Yakabuskie had no legal obligation to respond to either question. He declined to do so. Constable Wilson did not believe Ms. Cowan when she told him Mr. Yakabuskie's name.

In the General Occurrence Report completed on April 20, 2003, Constable Wilson stated that he "demanded the male to identify himself" and "advised ... he may be arrested for failing to identify himself". Failure to identify oneself is not lawful grounds for an arrest under the Liquor Licence Act.

Section 31(4) and (5) of the Liquor Licence Act however, authorizes a police officer to arrest without warrant a person who is in an intoxicated condition "in a place to which the general public is invited or permitted access".

Constable Wilson asked Mr. Yakabuskie if he had been drinking. He did not ask Ms. Cowan or Mr. Yakabuskie where they had been or where they were going. Mr. Yakabuskie responded that he had one beer. Constable Wilson did not believe him. Mr. Yakabuskie did not display any of the classic symptoms of intoxication. His clothing was not in disarray, he understood the questions being

asked, he was not unsteady on his feet or falling down, urinating on the street or vomiting.

Constable Wilson stated that he decided to arrest Mr. Yakabuskie because he had formed a belief Mr. Yakabuskie was intoxicated due to the strong odour of alcohol on his breath, his bloodshot eyes and his aggressive demeanour in response to police questioning. Constable Wilson acknowledged that until he had a conversation with Mr. Yakabuskie, he had not witnessed any belligerent or combative behaviour.

Constable Wilson could not clearly explain why he felt it necessary to place Mr. Yakabuskie under arrest, rather than transport him home or, if he was in such an advanced state of intoxication, to a hospital as is permitted by section 36(1) of the Liquor Licence Act.

Given the above, and the testimony of both Ms. Cowan and Mr. Yakabuskie it was certainly open to the Hearing Officer to conclude that the arrest in question was neither lawful nor necessary.

In the same way that he objected to being questioned, Mr. Yakabuskie objected to being arrested. Constable Wilson was aware that an individual has the right to resist an unlawful arrest.

Constable Wilson indicated in his notes and in the Duty Report completed on August 15, 2003 that during the struggle on the ground during the arrest, he thought he saw Mr. Yakabuskie reaching for something in his waistband that may have been a knife. It was "very dark outside with artificial light". If it was Constable Wilson's perception Mr. Yakabuskie might have a weapon, we find it striking that no body search was noted in any police report.

Constable Wilson also stated that during the arrest, Mr. Yakabuskie cocked his fist as if to strike out at him. As a distraction and to protect himself, Constable Wilson hit Mr. Yakabuskie several times about the head. The Criminal Code empowers police officers to use necessary force in the performance of their duties. However, if the arrest itself was unlawful or unnecessary then any use of force that flowed from the arrest was also improper.

It is also evident that Ms. Cowan and Mr. Yakabuskie had interactions with the police in the past that cast them in a less than flattering light. Ms. Cowan and Mr. Yakabuskie were not totally consistent in their testimony during examination-in-chief or cross-examination. This was remarked on and taken into consideration by the Hearing Officer. Indeed, he noted that he was cautious of the weight he placed on such evidence.

On balance, we find that the Hearing Officer considered the evidence and made clear findings of fact about Constable Wilson's demand for identification, the

escalation during the encounter, the arrest and the subsequent struggle by the roadside.

The basis for this conviction was, in the Hearing Officer's words, founded largely on credibility. He chose to accept significant portions of the testimony of Mr. Yakabuskie and Ms. Cowan and to conclude that Constable Wilson's version of events was, on balance, less credible. His reasons, although brief, support this conclusion. Further, based on the record, it cannot be said that his conclusions are void of evidentiary foundation.

For these reasons, we would dismiss the appeal.

DATED THIS 20th DAY OF NOVEMBER 2006.

Dr. Tammy Landau
Member, OCCPS

Hyacinthe Miller
Member, OCCPS